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No. 94

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (R. 46–52) has not yet been reported. The Report and Order of the Federal Communications Commission adopting the rules in issue (R. 16–27) and the rules (R. 27–29) appear at 18 F. R. 7796.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1955 (R. 52). The petition for a writ of certiorari was filed on May 23,

1955, and was granted on October 10, 1955 (R. 53). The jurisdiction of this Court rests on 5 U. S. C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 309 (b) of the Communications Act of 1934, which requires a hearing before the denial of an application for a radio station license, prevents the Federal Communications Commission from adopting general regulations fixing limitations on the multiple ownership of radio facilities.

STATUTES AND REGULATION INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U. S. C. 151 *et seq.*, are as follows:

> Section 4 (i):
>
> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions. [47 U. S. C. 154 (i)]
>
> Section 303:
>
> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations

and to carry out the provisions of this Act: * * *

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, * * *. [47 U. S. C. 303]

Section 309 (b):

If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * [47 U. S. C. 309 (b)]

The pertinent portion of Regulation Section 3.636 *Multiple Ownership* provides:

> (a) No license for a television broadcast station shall be granted to any party (including all parties under common control*) if
>
> *The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.
>
> * * * * *
>
> (2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or director to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five tele-

vision broadcast stations.** [47 C. F. R. 3.636]

**In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors who directly or indirectly own 1% or more of the outstanding voting stock.[1]

STATEMENT

This action was brought by respondent Storer Broadcasting Company ("Storer") against the United States and the Federal Communications Commission to set aside the Report and Order of the Commission, dated November 25, 1953, and amended rules adopted thereby (R. 33–38).[2] These rules place a ceiling upon the number of radio and television broadcast stations in which any one person may have an interest. They apply, respectively, to standard broadcast (AM) radio stations, frequency modulation (FM) radio

[1] The corresponding rules dealing with multiple ownership of standard broadcast (AM) stations and FM broadcast stations are contained in Sections 3.35 and 3.240. (47 C. F. R. 3.35, 3.240; R. 27–29) They are the same as the television station rule except that the maximum limit was fixed at seven.

All three rules contain separate provisions against the ownership of more than one station serving substantially the same area. This provision was not challenged in the present case.

[2] The action was instituted in the United States Court of Appeals for the District of Columbia Circuit on January 22, 1954, by the filing of a petition for review under Section 402 (a) of the Communications Act of 1934, 47 U. S. C. 402 (a), Section 4 of the Act of December 29, 1950, 64 Stat. 1129, 1130, 5 U. S. C. 1034, and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009.

stations, and television (TV) broadcast stations, and declare in substance that no person may have an interest in more than seven AM stations, seven FM stations, and five TV stations.

The proceeding which led to the promulgation of the challenged rules was instituted by a Notice of Proposed Rule Making (R. 13–16; 13 F. R. 5060), which set forth the text of proposed amendments to the then-existing multiple ownership rules of the Commission[3] and provided for the filing of comments by interested persons. Written comments were submitted by Storer[4]

[3] The Commission has had multiple ownership rules since 1940. The first such rule (see 5 F. R. 2382) pertained only to FM stations (then called high-frequency stations) and provided (1) that no person should own or control more than one station serving substantially the same area, and (2) that no person should own or control more than one station except upon a showing that competition would be fostered or a distinct service rendered and that no undue concentration of control would result. This rule further provided that ownership or control of more than six stations would be considered a concentration of control inconsistent with the public interest.

In 1941 a substantially similar rule was adopted for TV stations, except that the maximum number of stations was set at three (see 6 F. R. 2282, 2284–2285). In 1944, the maximum was raised to five (9 F. R. 5442).

A multiple ownership rule for AM stations, adopted in 1943, contained only a restriction relating to ownership or control of more than one station serving the same area (see 8 F. R. 16065). This restriction corresponded to the provision previously adopted for FM stations.

[4] Storer's position in the rule-making proceeding was that "the proposed amendments should not be adopted in the form

(then known as The Fort Industry Company) and eleven other parties. Each of these parties subsequently participated in oral argument held before the Commission *en banc*. No challenge has been made as to the regularity of the rule-making proceedings.

In its report, the Commission declared (R. 21) that the "fundamental purpose * * * of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest." The Commission stated further that "[i]t is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees." (*ibid.*). The report also sets forth the Commissions reasons for rejecting various alternative proposals (which would have given effect to additional considerations such as size, class, and geographical location of stations) (R. 22–23); the reason that the rules do not undertake to draw a distinction between controlling and non-controlling interests (R. 23); and the considerations

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set forth" (R. 8), and that the "public interest, convenience and necessity would be served best if the proposed amendments permitted the ownership of the same number of FM stations and Television stations as standard broadcast stations" (R. 9). See, also, R. 11–12.

favoring the specific maximum limitations adopted (R. 25–26).

At the time the rules were adopted, Storer (or its wholly owned subsidiaries) had seven AM stations, five FM stations, and five TV stations.[5] It also had on file with the Commission a pending application for a sixth TV station. This application was dismissed by the Commission without hearing because of conflict with the Commission's rules.[6] Storer thereupon filed its suit seeking review of those rules.[7]

---

[5] It had *AM stations* at Atlanta, Georgia; Birmingham, Alabama; Detroit, Michigan; Miami, Florida; San Antonio, Texas; Toledo, Ohio; and Wheeling, West Virginia; *FM stations* at Atlanta, Georgia; Detroit, Michigan; Miami, Florida; Toledo, Ohio; and Wheeling, West Virginia; *TV stations* at Atlanta, Georgia; Birmingham, Alabama; Detroit, Michigan; San Antonio, Texas; and Toledo, Ohio.

[6] A subsequent amendment to the rules, isued on September 17, 1954 (19 F. R. 6099), after the filing of Storer's petition to review, permitted a licensee to have a total of seven TV stations, provided that at least two of these stations were in the ultra high frequency (UHF) band. Its purpose was to encourage UHF television. This amendment did not enable Storer to revive its dismissed application, since that application was for a very high frequency (VHF) station and Storer already had five VHF licenses. It did, we note parenthetically, enable Storer to acquire two additional UHF stations, one in Portland, Oregon, and the other in Miami, Florida, the site of its dismissed VHF application. In this brief we shall treat the case (as did the court below) on the basis of the rules as they stood when the report of November 25, 1953, was issued.

[7] Storer did not file an appeal from the dismissal of its application.

The court of appeals declared invalid the provision of Section 3.636 (*supra*, pp. 4–5), which states that the Commission will in any event consider that there would be a concentration of control contrary to the public interest for any person to have an interest in more than five television stations.[8] The court's decision was rested solely on the ground that Section 309 (b) of the Communications Act (*supra*, p. 3) requires a hearing before an application for a license may be denied and that the effect of the rule would be to cut off that right. Having decided that Section 309 (b) precluded the adoption of a binding rule establishing criteria which an applicant must meet, the court did not reach questions tendered by Storer as to the reasonableness of the particular rule adopted.

SUMMARY OF ARGUMENT

I

The court of appeals set aside the Commission's multiple ownership rules because it concluded that the requirements of Section 309 (b) of the Communications Act (providing in substance that an application for a broadcasting license shall not be denied without hearing) preclude a binding

[8] The opinion and judgment below is directed specifically to Section 3.636. However, as the court below pointed out, the invalidation of the television rule necessarily has the effect of invalidating the similar limitations on multiple ownership contained in the rules applicable to AM stations and FM stations.

regulation that no person shall be granted more than a stated number of licenses. If this interpretation of Section 309 (b) is correct, then, logically, there is no room for exercise of the expansive rule-making powers conferred by Sections 4 (i) and 303 of the Act. Otherwise stated, the Commission is precluded from exercising that power which this and other courts have repeatedly sustained, notably in upholding the Commission's Chain Broadcasting Regulations in *National Broadcasting Co.* v. *United States,* 319 U. S. 190: the power to give greater concreteness to the standard of the "public interest" by promulgating appropriate general regulations, and to deny applications which fail to conform to such regulations.

There is no basic inconsistency between the quasi-legislative power of an administrative agency to establish general criteria, embodied in rules and regulations, which it will apply in licensing proceedings, and its adjudicatory function of passing upon individual license applications, considering them on the basis of the general standards laid down in the statute and the regulations. The right to a hearing accords the right to show that one is able to meet the standards lawfully adopted. There is no such right when it is undisputed that the applicant cannot meet those standards. In this case the respondent does not seek a hearing to show that its application meets the requirements of the Commission's regu-

lations. Its purpose, rather, is to have the regulation declared invalid or inapplicable to it.

The court of appeals stopped short of holding that the Commission can never adopt a rule which, as applied to particular circumstances, may bar particular applicants. Thus, it indicated that it would recognize a rule which excludes from consideration applicants who have been guilty of unlawful conduct. But, as the *National Broadcasting* case, *supra*, emphasizes, the Commission's power to particularize the "public interest" standard is not confined to a power to declare simply that an applicant's participation in some designated species of illegal or criminal conduct will preclude a grant. The power extends generally to the establishment of criteria for the exercise of the licensing power committed by Congress to the Commission, subject, of course, to the condition that the particular exercise of the rule-making function be consistent with the standards and objectives of the Communications Act.

The fact that this Court's decision in *National Broadcasting*, upholding the closely analogous Chain Broadcasting Regulations, may be deemed to rest in part upon the Court's observation that the application of the regulations would not be inflexible affords no basis for distinguishing the instant case. No more than the Chain Broadcasting Regulations are the multiple ownership rules fixed "for all time" (*National Broadcasting*, p. 225). They are subject to repeal or amend-

ment (having in fact been modified during the pendency of these proceedings) and, in an appropriate case, the Commission, of course, has power to waive them.

II

The policy of the Communications Act is one of free competition. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 474. Congress was gravely concerned that, absent an assertion of governmental control, "the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. Competition in the presentation of viewpoints, no less than competition in the economic sense, is vital, for "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *." *Associated Press* v. *United States*, 326 U. S. 1, 20. The Commission's multiple ownership rules undertake to implement this competitive philosophy which lies at the root of the Act. Their purpose, the Commission stated (R. 21), is "to maximize diversification of program and service viewpoints" and "to prevent any undue concentration of economic power."

Plainly, the rules are appropriate to these ends. There are only a limited number of broadcasting channels available and many, rather than few,

voices can be heard only if licenses are widely distributed. Moreover, since the formation of public opinion is important on the national, as well as on the local, level, effective diversification cannot be achieved merely by assuring that there will be some competition in each region. To permit the growth of large chains, however the component stations might happen to be distributed, would be to invite a creeping trend to uniformity.

The rules also serve the related purpose of safeguarding against undue concentrations of economic power in the hands of particular broadcasters. Since the owner of numerous stations is apt to possess substantial bargaining advantages over smaller competitors, it is important, if the independents are to flourish, that they receive protection against encroachment by large and powerful chains.

Respondent's suggestion that the Commission is treating it as an antitrust violator, but without proof of violation, rests upon a misconception. The Commission does not purport to enforce the antitrust laws, though the multiple ownership rules are, indeed, in keeping with the underlying philosophy of those laws. The Commission's object in promulgating the instant rules, as in the case of the Chain Broadcasting Regulations, is to assure "the larger and more effective use of radio" (*National Broadcasting, supra,* p. 216).

They do this by forestalling undue concentration and by insisting upon a reasonably widespread distribution of channels to diverse parties.

The rules before the court (which are actually amendments of prior rules) are the product of an accumulated agency experience of many years, both in dealing with the problem of multiple ownership on an *ad hoc* basis (the approach followed in relation to AM stations until 1953) and by rule-making (the approach adopted at an early date in relation to FM and TV). They rest upon informed judgment and upon intimate working knowledge of the pattern and development of the industry. The type of empiric judgment which the Commission has made is peculiarly within its province and must stand in the absence of a plain showing of arbitrariness. In fact, there is nothing to suggest that the line which the Commission has drawn is not an eminently reasonable one.

Respondent urges that an applicant must be allowed to show affirmative factors in his favor which might be weighed in the scales against considerations resting on multiple ownership. But this is in essence an argument, untenable in the face of the authorities, that the Commission may have only "policies" and not rules. The rules here reflect the judgment that preservation of full opportunity for competition and for the presentation of diverse viewpoints is, *in and of itself*, of sufficiently great importance to warrant the pre-

vention of inordinately large holdings of broadcasting channels, and that there are enough different persons in the United States capable and desirous of serving the needs of the public so that extremes of multiple ownership may be avoided without adversely affecting the public interest in securing qualified licensees. There is nothing in this record to impugn the wisdom of that judgment and certainly nothing to show that it was arbitrary.

ARGUMENT

Introduction

The court of appeals set aside the limitations on station ownership in the Commission's multiple ownership rules because it was of the view that such rules, "however laudable" their purpose, conflict with Section 309 (b) of the Communications Act, which requires a hearing whenever the Commission cannot determine upon examination that the grant of an application would serve the public interest. A purely literal reading of Section 309 (b), without consideration of the other provisions of the Act, leads to the conclusion that the Commission is estopped from prescribing, by binding rule, the general standards which it will employ in licensing proceedings. Aware, however, that there have been numerous decisions, including decisions of this Court, upholding this rule-making power, the court below stated that there were exceptions to the contrary doctrine which it was declaring. It said that an application for

license might be denied pursuant to rule and without a hearing if, but only if, (1) the applicant was an alien, (2) the license was sought for an unlawful use or purpose, or (3) a particular frequency was sought at a location to which that frequency had not been assigned in consequence of the Commission's adoption of an allocation plan.[9] Since the multiple ownership rules do not fall within any of these categories, they were held to be invalid.

We shall argue under Point I that the court of appeals misinterpreted the decisions which sustain the Commission's exercise of the rule-making power; that these decisions are not reconcilable with the result reached below; and that the rule-making power extends generally to the establishment of criteria for the exercise of the licensing function committed by Congress to the Commission, subject, of course, to the condition that the particular exercise of the rule-making function be consistent with the standards and objectives of the Communications Act.

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[9] The court below reiterated its view that Section 309 (b) limits the Commission's genral rule-making power to the foregoing situations in *City of New York Municipal Broadcasting System* v. *Federal Communications Commission*, 223 F. 2d 637 (C. A. D. C.). There the court held, solely on the authority of its *Storer* decision, that the Commission could not deny an application to make changes in transmission equipment, although the changes would violate a technical rule on the subject, without granting a hearing on whether waiver of the rule would be in the public interest.

We shall urge under Point II that the rules in question are addressed to objects which have been entrusted to the protection of the Commission, that they are appropriate to the achievement of their declared purposes, and that they are reasonable.

I. The Commission may establish, by appropriate rule, the standards which it will apply in passing on applications for broadcasting licenses

Section 301 of the Communications Act provides that no person shall use any apparatus for the transmission of energy by radio[10] in interstate or foreign commerce except pursuant to a license granted by the Commission. The Commission's power and duty with respect to licensing are treated in some detail in the Act. Section 308 (a) provides that the Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application. The application is required to set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant. Sections 308 (b), 319 (a). The application may be granted only if the public interest, convenience and necessity would be served

[10] Section 3 (b) of the Act includes television within the definition of "radio communication". Radio communication is the "transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *."

thereby. Sections 307 (a), 309 (a), 319 (c). Plainly, the licensing function is not a mere ministerial task, but requires the Commission to make administrative judgments as to whether proposed operations will be in the public interest, and whether applicants have the appropriate qualifications to serve that interest. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 215–216.

The Commission's rule-making authority is specifically set forth in two sections of the Act. Section 4 (i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 provides:

> Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: * * *
>
> * * * * *
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *.

The court of appeals held that this general rule-making power of the Commission could not be exercised to limit the right of applicants to a hearing under Section 309 (b) because "any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected" (R. 50). It concluded, therefore, that the multiple ownership rules, insofar as they require the threshold denial of inconsistent applications, are invalid, "however laudable" the object of those rules might be (R. 52). This holding cannot be reconciled with decisions of this and other courts upholding the Commission's power to promulgate general rules enunciating the policy which it will apply in determining whether a particular application meets the statutory standard of the public interest. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U. S. 284; *Logansport Broadcasting Corp.* v. *United States,* 210 F. 2d 24 (C. A. D. C.); *Felman* v. *United States,* N. D. Ill., March 13, 1950 (not reported), affirmed *per curiam,* 339 U. S. 973. In each of these cases the challenged rule, like the multiple ownership rule here involved, set forth certain conditions under which the Commission would refuse to grant a license as contrary to the public interest.

The *National Broadcasting* case, *supra* (to which the court of appeals did not refer), is

completely inconsistent with the holding below that a hearing is, in all cases, necessary "before denying an application for an available frequency sought by a citizen for a lawful use" (R. 52). This Court there upheld the Commission's Chain Broadcasting Regulations as a valid exercise of the Commission's rule-making powers. Those regulations require that "[n]o license shall be granted" to licensees or applicants having certain specified relationships with networks—relationships not unlawful in themselves, but found by the Commission to be detrimental to the public interest."[11] The Court reviewed in detail the purposes of the Communications Act and the Commission's statutory powers, and it sustained the Commission's authority to make rules of a non-technical and non-engineering nature establishing standards of the public interest which it would follow in issuing licenses.

The Chain Broadcasting Regulations were vigorously challenged in the statutory three-judge district court and in this Court on the express ground that the Commission could not deal with the problem by general rule, but was required to consider each application upon an *ad hoc* basis. This argument was rejected. In the district

[11] The proscribed practices included exclusive affiliation agreements with networks, unduly long affiliation contracts, burdensome restrictions on the stations' right to reject network programs, control by networks of station rates, etc. *National Broadcasting*, 319 U. S. at 198–209.

court, Judge Learned Hand stated (*National Broadcasting Co.* v. *United States*, 47 F. Supp. 940, 945 (S. D. N. Y.):

> Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future.

This Court's opinion is no less decisive. It pointed out (p. 218) that the Chain Broadcasting Regulations "represent a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934". The Court emphasized (p. 219) that the regulatory powers which Congress gave the Commission were "not niggardly but expansive," and concluded (p. 224) that the Communications Act "authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting."

It is clear, therefore, that *National Broadcasting* cannot be squared with the decision below. The Chain Broadcasting Regulations were not restricted to the proscription of unlawful practices and do not come within any of the exceptional categories formulated by the court of appeals. And the stated consequence of a failure of compliance with the rules (as in the case of the

multiple ownership rules here involved) is denial of a license.

Respondent argues (Br. in Opp., pp. 8–9) that the Chain Broadcasting Regulations were upheld because in applying them the Commission would still consider in each case whether grant of a proposed application would be in the public interest. In support of this position, it quotes the statement in the *National Broadcasting* case that "[i]n each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'" (319 U. S. at 225). This language means simply that in each case the Commission must exercise an "ultimate judgment," not that it must hold a hearing regardless of the nature of the issues raised by the application. As this Court had previously pointed out in holding the regulations reviewable (*Columbia Broadcasting System* v. *United States*, 316 U. S. 407), they are not mere "announcements of policy" (p. 422), but are "rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the ground specified in the regulations without more" (p. 418).[12] This statement, and the further statement in *National*

[12] The Court also pointed out (p. 420) that the operation of the regulations "is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations".

Broadcasting (which directly follows the sentence quoted by respondent) that "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations" (p. 225), indicate that the "flexibility" of the Chain Broadcasting Regulations, to which the Court referred in the *National Broadcasting* case, arose from the fact that the Commission could always change them through amendment or repeal. Similarly, in the instant case, the Commission may amend the multiple ownership rules as the public interest requires,[13] or waive them for good cause. Sections 1.701, 1.702, Commission's General Rules and Regulations, 47 CFR 1.701, 1.702.

It is to be noted that, in the instant case, respondent is in no position to suggest that there are special or extraordinary factors which might have warranted an exception from the rule. When its application was dismissed as falling under the ban of the rule, it did not seek reconsideration or raise in any other way a contention that the rule should be waived in the particular circumstances. Moreover, respondent has not chosen to appeal from the denial of its application. Its proceeding is one to enjoin the promul-

[13] Indeed, as pointed out *supra* (note 6, p. 8) the Commission has modified the rules during the course of this litigation.

gation of the rules. It thus stands or falls on the proposition that the Commission had no power to adopt the rules in issue.

The *Felman* case, *supra*, is another instance in which Commission rules of the type here under review have been upheld. The rules there in question provided that no license will be granted or renewed where, as consideration for the transfer or assignment of a station, the transferor reserves a right to reassignment of the license or the right to use the facilities of the assigned station. 47 CFR 3.109, 3.241, 3.659. There again, as in the case of the rules here in issue, the Commission prescribed conditions under which an application for a lawful use of an available frequency would be dismissed without hearing. The three-judge district court upheld the Commission's exercise of its rule-making powers and this Court affirmed *per curiam*.[14]

In *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284, this

[14] The motion to affirm the district court's judgment in *Felman*, which this Court granted, stated the Government's position as follows (No. 814, Oct. Term, 1949, Motion to Affirm, pp. 5–6):

"The import of the Federal Communications Act is that the licensee of a radio station shall be fully amenable to public regulation of his station for the purpose of assuring operation of the station in the public interest. The Commission may therefore adopt regulations against grant or renewal of a broadcasting license if the licensee has assumed an obligation to a third person encroaching upon his ability best to serve those whom his broadcasts reach."

Court upheld the Commission's authority to adopt rules providing that an application for license or renewal of license would not be granted where the applicant followed a policy of broadcasting lotteries in violation of Section 1304 of the Criminal Code.[15] The Court pointed out (pp. 289–290, note 7) that the statutory standard of public interest was sufficiently broad to permit the Commission to consider an applicant's violations of a criminal statute, and it ruled (p. 290) that "if this consideration is a proper one in individual cases, there is no reason why it may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity." "Indeed," the Court stated (p. 289), the Commission would be "remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, either *by general rule* or by individual decisions" (emphasis added). The court below attempted to distinguish the lottery rules from the multiple ownership rules on the ground that the former were written in terms of denying licenses to persons involved in an illegal course of conduct. But this, as the court of appeals itself recognized, is not a distinction made by Section 309 (b).

[15] Although the Court sustained the Commission's power to promulgate the regulations, it held that portions of the rules were invalid because the so-called "give-away" programs which the Commission condemned as lotteries were not in fact lotteries within the meaning of 18 U. S. C. 1304.

Logansport Broadcasting Corp. v. *United States*, 210 F. 2d 24 (C. A. D. C.), points up even more clearly the fallacy of the court of appeals' restrictive interpretation of the Commission's rule-making powers. For the rules there sustained, providing for a nationwide allocation of television frequencies and for automatic dismissal, without hearing, of applications not conforming to the plan, clearly are no less inconsistent with the court's all-embracing view of the hearing requirements of Section 309 (b) than are the multiple ownership rules.[16] The court apparently felt that removing a frequency from availability by rule was appropriate, in spite of Section 309 (b), where it was done in order to make it available for some other community but not where the objective was to keep it available for some other applicant not already a multiple licensee. But there is nothing in the broad statutory delegations of rule-making powers to the Commission which furnishes any foundation for the view that these powers extend to the former situation but not to the latter.

The only rational explanation of the cases is that the Commission can particularize by rule the standards which it will apply in passing on individual license applications, and that it is not

[16] Indeed, in the *Logansport* case, *supra*, it was argued that the provisions of Section 307 (b) of the Communications Act, imposed an additional, special requirement that allocations of frequencies among communities be done on a case-by-case basis rather than by general rule. See 210 F. 2d at 26–27.

required by Section 309 (b) to reopen, on a case-to-case basis, the policy judgments which the rules embody. Those decisions establish that the rule-making power is not limited to prohibiting conduct specifically condemned by the Act, and that the Commission may adopt enforcible rules to implement all policies which are fairly comprehended by the statutory concept of the "public interest." To require the Commission to consider in each case whether the grant of a particular application, which does not comply with a rule, might nevertheless be in the public interest (as the court of appeals would have it do), would turn binding rules into no more than "policy" announcements settling nothing. Such a result would defeat the basic purpose of rule-making in the licensing field, namely, to permit the Commission to "state * * * in advance" factors which will result in denial of applications. *American Broadcasting,* supra, p. 290.

This interpretation of the Communications Act does not do violence to Section 309 (b) but gives effect and scope to those sections of the Act which confer broad rule-making authority upon the Commission. There is no basic opposition between the Commission's quasi-legislative powers, which enable it to establish appropriate criteria for application in individual licensing proceedings, and the adjudicatory function of passing upon individual applications. To be sure, Section 309 (b) guarantees an applicant the opportunity

to show, at a hearing, that he is able to meet the standards set forth in the Act and in the Commission's rules lawfully adopted thereunder. Here, however, there is no such question. It appears, on the face of it, that the applicant cannot satisfy the specified standards. In such circumstances, there is no occasion or necessity for an adjudicatory proceeding.

II. The challenged multiple ownership rules constitute an appropriate and reasonable exercise of the Commission's rule-making power

Congress, as observed above, did not attempt "an itemized catalogue" (*National Broadcasting, supra,* p. 219) of the subjects with which the Commission might deal by rule or regulation. Instead, it defined "broad areas for regulation" (*id.* 220) and adopted, as the "touchstone" of the Commission's regulatory power, the standard of "public interest, convenience, or necessity" (*id.* 216), a standard which "leaves wide discretion and calls for imaginative interpretation." *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U. S. 86, 90.

An important aspect of the "public interest" to be served by the Commission is the maintenance of the field of broadcasting as one of free and extensive competition. See *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474. As this Court has observed, the Act was adopted "under the spur of

a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. Thus, Section 313 provides that a court may, upon finding any licensee guilty of a violation of the antitrust laws, revoke its license in addition to imposing other sanctions. Section 311 directs the Commission to refuse a license to any person who has suffered a revocation under Section 313.[17] Although these sections deal specifically with the extreme case of one who has been judicially determined to be a violator of the antitrust laws, they serve to emphasize that the Commission, in determining whether grants will best serve the public interest, owes a high duty to implement the underlying philosophy which motivates and informs the antitrust laws: the philosophy which puts its faith in multiple centers of activity and in free competition among them. It needs no argument or demonstration that, in a democratic society, this principle assumes a very special importance in the area of mass communications. *Associated Press* v. *United States*, 326 U. S. 1, 20. Cf. *Mansfield*

[17] Congress also forbade persons engaged in radio communications from engaging in communications by wire, and vice versa, if the purpose or effect thereof "may be" substantially to lessen competition, to restrain commerce, or unlawfully to create a monopoly (Section 314).

Journal Co. v. Federal Communications Commission, 180 F. 2d 28, 33 (C. A. D. C.), holding that conduct which falls short of violation of the Sherman Act may nonetheless run counter to the policies of diversification and competition which Congress aimed to foster through the Communications Act.[18]

The numerical proscriptions in the multiple ownership rules were intended, the Commission stated in its report (R. 21), "to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis." By providing for diversification of station ownership through limiting the number of stations in which any one person may have an interest, the rules implement that policy in two ways: (1) they "maximize diversification of program and service viewpoints," and (2) they "prevent any undue concentration of economic power" (*ibid.*). In the Commission's view, "operation of broadcasting stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees," since the "vitality of our system of broadcasting depends in large part on the introduction into this field of licensees

[18] In the *Mansfield Journal* case, the court held that the Commission had properly considered the applicant's anti-competitve practices in the conduct of its newspaper business in determining not to grant it a license for a radio station.

who are prepared and qualified to serve the varied and divergent needs of the public for radio service" (*ibid.*).

The multiple ownership rules are a reasonable means of effectuating the policy of diversification.[19] Concentration of station ownership in the hands of a relatively small number of licensees would, like the network abuses which the Chain Broadcasting Regulations were designed to eliminate, " 'prevent the maximum utilization of radio facilities in the public interest' " (*National Broadcasting, supra,* p. 224). There are only a limited number of broadcasting channels available for licensing, and station owners may wield enormous influence in the guidance and formation of public opinion. Certainly it is not unreasonable for the Commission to conclude that the public interest requires that broadcasting stations be allocated so as to insure that a wide diversity of viewpoints will be heard. As this Court stated in *Associated Press* v. *United States,* 326 U. S. 1, 20, "[t]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *."[20]

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[19] As noted above (note 4, pp. 6–7), in commenting to the Commission on the proposed rules, Storer (then known as Fort Industry Company) did not question the propriety of the Commission's imposing some limitations upon multiple ownership; it urged only that the same limitation should be adopted for AM, FM and TV (R. 8–9, 11–12).

[20] Limiting absentee ownership and control of stations also furthers the public interest in obtaining programming by

Since public opinion on major issues is formed and exists on a nationwide basis, effective diversification of viewpoints cannot be achieved, as respondent suggests (Brief in Opp., p. 14), merely in relation to local service areas. If, for example, one person were to acquire broadcasting facilities in a large number of cities, there would be grave cause to fear a tendency to uniformity in the presentation of viewpoint on the national level, even though in each particular city involved there would still be other communication facilities. In any realistic sense, the fullest public presentation of all shades of opinion can be adequately protected only if the problem is dealt with on a national scale.

In its administration of the Communications Act, the Commission has, in a variety of contexts, "consistently adhered" (R. 21) to this important principle of diversification. Thus, in selecting among competing applicants for a station, the Commission has favored applicants lacking interests (or significant interests) in other stations,[21] or, absent such a choice, persons whose other stations have service areas which do not overlap

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local stations which is responsive to the needs of the community.

[21] *Plains Radio Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 359 (C. A. D. C.); *Bamberger Broadcasting Service, Inc.*, 11 F. C. C. 211, 222; *Albert S. and Robert A. Drohlich*, 11 F. C. C. 700, 705; *Associated Broadcasters, Inc.*, 12 F. C. C. 688, 699–700; *Southern Tier Radio Service*, 11 F. C. C. 171, 182–3; *Aladdin Radio and Television, Inc.*, 9 Pike & Fischer, Radio Regulation 1, 40.

(or significantly overlap) the service area of the channel sought.[22] In recognition of the fact that grant of a license to a non-newspaper applicant will result in greater diversity among the mass communications media, the Commission has preferred applicants without newspaper connections. *Plains Radio Broadcasting, supra,* p. 363; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (C. A. D. C.), certiorari denied, 342 U. S. 830. Since at least 1940 (see *Courier-Journal & Louisville Times Co.,* 5 Pike & Fischer, Radio Regulation 348), the Commission rules have prohibited granting to one person two stations of the same type (AM or FM radio, or TV) which serve substantially the same area.[23] And, as observed *supra* (note 3, p. 6), the Commission has had some form of multiple ownership rules since 1940.

The multiple ownership rules also serve the related purpose of effectuating the congressional

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[22] *Meadville Tribune Broadcasting Co.,* 11 F. C. C. 666, 670; *Zinn and Golliday et al.,* 11 F. C. C. 419, 425; *Norman Broadcasting Co.,* 5 Pike & Fischer, Radio Regulation 120, 142; *Central Broadcasting Co.,* 11 F. C. C. 1310, 1317, affirmed *sub nom. Plains Radio Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 359 (C. A. D. C.).

[23] This provision is a part of the multiple ownership rules involved, but has not been challenged by respondent. Similar but even more far-reaching restrictions have been imposed upon the licensing of stations to networks, where the effect may be to restrain competition. See discussion of Chain Broadcasting Regulations in *National Broadcasting, supra,* pp. 206–208.

policy against undue concentration of economic power in the hands of individual members of the broadcasting industry. The owner of numerous stations is in a position to utilize the enhanced bargaining power conferred by multiple ownership to gain substantial economic advantage over weaker competitors with respect to network affiliations, advertising, programming, service, etc.—an advantage which flows not from rendering a better service to the public but from the concentration of economic power. It was not unreasonable for the Commission to conclude that the "'public interest' * * * of the listening public in 'the larger and more effective use of radio'" (*National Broadcasting, supra,* p. 216) required it to protect independent broadcasters from encroachment by large and powerful chains.

Since the purposes of the multiple ownership rules are to promote diversification and to forestall undue concentration of economic power in the hands of individual members of the broadcasting industry, the Commission is not required to approach the problem, as respondent argues (Brief in Opp., pp. 10, 13), as if it were deciding in each case whether the acquisition of one additional station would constitute a provable violation of the antitrust laws. For, as the Commission's report makes clear (R. 21-22), the multiple ownership rules do not purport to enforce the antitrust laws as such. They seek to carry out the broader, and prophylactic, policy

of preventing the emergence of a pattern of "monopolistic domination in the broadcasting field" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137). Cf. *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 33 (C. A. D. C.). In the *National Broadcasting* case, *supra*, the regulations were not rested on a conclusion that the various practices to which they pertained could be regarded as *per se* violations of the anti-trust laws (p. 224). The practices in question were proscribed not because they were found unlawful, but because they were deemed to "'prevent the maximum utilization of radio facilities in the public interest'" (*ibid.*). The *National Broadcasting* case makes clear, we submit, that the Commission, in the exercise of its rule-making power, may determine that a trend toward heavy concentration is antithetical to the maximum utilization of radio facilities and contrary to the public interest.

If this be so, the Commission may set a limit or ceiling to ward off the dangers reasonably apprehended.[24] The limitations established do not become invalid because another group of experts

[24] We note in passing that the situations are myriad in which the standard established by a statute or rule is fixed in terms of numerical limitations. Consider, for example, minimum-wage and maximum-hour provisions (*United States* v. *Darby*, 312 U. S. 100), provisions establishing maximum weights for trucks using state highways (*Morris* v. *Duby*, 274 U. S. 135), and provisions placing limitations

might have drawn the line lower or higher. They are not vulnerable because A, the owner of nineteen broadcasting licenses (seven AM, seven FM and five TV), appears to have less influence and power over public opinion than B, owner of a similar number of stations, and because the potential injury to the public in making a twentieth grant to A may be less immediately apparent than in the case of such a grant to B. The essence of the legislative or rule-making function is the prescription of a general standard applicable to all members of a class. See *North American Co.* v. *Securities and Exchange Commission*, 327 U. S. 686, 710–711; *Assigned Car Cases*, 274 U. S. 564, 583.

The Commission, of course, might have attempted to deal with the problem on a case-to-case basis.[25] It had followed that approach, so far as AM service was concerned, until the 1953 amendment of its rules. It was in the light of its experience with an *ad hoc* approach, as compared to its fourteen years of experience with multiple ownership rules as applied first to FM and later to TV, that the Commission decided that the

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upon the number of liquor licenses which will be issued (*Decie* v. *Brown*, 167 Mass. 290; *Cox* v. *Timm*, 182 Ind. 7).

[25] "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 421.

fairer and more efficient procedure was by rule-making.[26] The development of a quasi-legislative standard through the piecemeal process of case-by-case adjudication suffers from the fact that in individual cases there are ordinarily a very limited number of participants and a variety of issues. By utilizing the rule-making procedure, the Commission was able to afford all interested parties an opportunity to participate and present their views on a single question of basic policy affecting both the public at large and individual licensees or prospective licensees.

Respondent's view, adopted by the court below, that the multiple ownership question is not an appropriate subject of rule-making rests fundamentally on the assumption that an individual applicant might be able to show some affirmative factor, such as high quality of proposed program service, which might be weighed in the scales against the disadvantages of concentration.[27] The

[26] The Commission's Report and Order states (R. 19): "Our determination here that the problems presented by the multiple ownership of broadcast stations are best resolved by the promulgation of rules of general applicability is made on the basis of the knowledge and experience acquired by this Commission over a period of more than a decade in the handling of these problems."

[27] The court of appeals stated (R. 51) that the question whether ownership of more than five television stations would be compatible with the public interest "must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the

appeals itself, sustaining other Commission rules which operate in precisely the same way as do the multiple ownership rules. We also showed that the multiple ownership rules are a reasonable implementation of valid policies well within the Commission's cognizance. This reply brief will be directed to respondent's interpretation of Section 309 (b), which differs from that of the court below; to its contention that the rules are, for various reasons, arbitrary and capricious; and to its argument that there was a failure of compliance with the Administrative Procedure Act.

I. The Rules Do Not Contravene Section 309(b).

The court of appeals held that Section 309(b) means "that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected" (R. 50). In our opening brief, we have shown that this interpretation of the statute is erroneous. Respondent has not attempted to support the rationale of the court of appeals. Instead, it has now taken the position[1] that Section 309(b) requires a hearing on an application whenever Congress itself has not "so defined the public interest as to preclude the grant" (Br. 14).

[1] Respondent contended before the court of appeals that the Commission's authority to adopt binding rules was limited to those matters as to which Congress had specifically itemized the power to make rules and regulations (Br. to Ct. App. 11).

This new position has apparently been devised by respondent to meet the needs of its case and to explain away the instances in which the Commission's authority to adopt rules governing the execution of its licensing functions has been sustained. Respondent has cited no relevant authority for its view.[2] It obviously cannot be derived from Section 309 itself. And while respondent states that its position makes "consistent" the "carefully reticulated licensing and rule making scheme" of the Act (Br. 14), it is clear that it does so only by preventing any meaningful utilization of the Commission's rule-making authority. For there is no need for a substantive rule by the agency where Congress has already specifically forbidden a grant.

It appears that under either the court of appeals' formulation of the problem, or respondent's revision thereof, the Commission would have no

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[2] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, and *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (Resp. Br. 14), are both irrelevant to the question of the scope of the rule-making power. The *Ashbacker* case held that where two applications were mutually exclusive, and only one could be granted, it was error to grant one without a hearing and to direct a later hearing which would put the other applicant in the position of a newcomer attempting to displace an existing licensee. The *Sanders* case held that a party likely to be financially injured by a grant was a party aggrieved who had standing to appeal under Section 402(b) of the Act, 47 U.S.C. 402(b).

In fact, this Court suggested in *Ashbacker* that the Commission might have adopted a rule requiring an application for a frequency, previously applied for, to be filed within a certain date to be eligible for a hearing. 326 U.S. at 333. Such a rule has been adopted. Section 1.724, 47 C.F.R. 1.724.

binding rule-making authority, even in those situations where Congress has expressly itemized the Commission's rule-making powers.[3] This is sharply illustrated by the recent case of *City of New York Municipal Broadcasting System* v. *Federal Communications Commission*, 223 F. 2d 637 (C.A. D.C.), in which the court of appeals, resting solely on the authority of its decision in the instant case, held that a hearing must be afforded an applicant wishing to install a transmitter in its station with power greater than the maximum permitted under Commission rule. Notwithstanding the fact that specific authority for adopting that type of rule is granted by Section 303 of the Communications Act, respondent suggests that a hearing was properly held to be required in the *City of New York* case because "Congress has not itself defined the public interest in respect of a single transmitter having multiple power ratings" (Br. 16, fn.). Thus, respondent's interpretation of the hearing provision (Section 309(b)) means ultimately that the Commission can have no effective rules even in areas where Congress has provided, by detailed specification, for the exercise of rule-making powers.[4]

It is clear, furthermore, that the Commission rules already sustained by the courts cannot be

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[3] It seems well settled, however, that an agency with the broad rule-making powers afforded the Commission (see Sections 4(i) and 303(f), (r) of the Act) is not limited in the adoption of rules to the specific matters itemized in its statute. *American Trucking Assns.* v. *United States*, 344 U.S. 298.

[4] Another illustration may serve to emphasize the practical consequences which would follow from this position. Section

distinguished as respondent suggests. The Chain Broadcasting Regulations, governing the relationship between independent stations and networks with respect to such matters as option time and exclusivity of affiliation, are not mere repetitions of a specific Congressional definition of the public interest. On the contrary, they represent, like the multiple ownership rules here in issue, "a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress." *National Broadcasting Co. v. United States*, 319 U.S. 190, 218.

This Court held in *Columbia Broadcasting System v. United States*, 316 U.S. 407, 420, that the Chain Broadcasting Regulations were reviewable because

> Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations.[5]

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303 expressly authorizes the Commission to adopt rules specifying the nature of the service to be performed by various classes of stations (303(b)) and rules assigning bands of frequencies to the stations of each class (303(c)). Such rules have been adopted. But under respondent's theory the Commission would nonetheless seem required to provide a full evidentiary hearing to an applicant for a police radio station wishing to operate in bands set aside under the applicable rule for television broadcasting.

[5] The similarity of the Chain Broadcasting Regulations to the multiple ownership rules is discussed fully in our opening brief, pp. 20-23.

Respondent argues (Br. 18) that those rules, which it admits cannot be distinguished under its formula from the multiple ownership rules, nevertheless contemplated a hearing in each case. In this connection, it rests heavily upon a quotation from the Government's brief in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, to the effect that an applicant would have the opportunity to show that the policies underlying the rules were not appropriate to his situation. But the fact is that the then existing rules, to which the quoted portion of the Government's brief referred, provided only that an application failing to conform to Commission rules would be considered defective unless accompanied by a petition to amend the rule or by a request for a waiver setting forth the reasons in support thereof. Sections 1.72, 1.81, 6 F.R. 2656.[6] There was no provision for a

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[6] Section 1.72 provided in pertinent part:

(c) Applications which are not in accordance with the Commission's rules, regulations or other requirements will be considered defective unless accompanied either (1) by a petition in accordance with Section 1.81 to amend any rule or regulation with which the application is in conflict, or (2) by a request of the applicant for waiver of, or an exception to, any rule, regulation or requirement with which the application is in conflict. Such request shall show the nature of the waiver or exception desired and set forth the reasons in support thereof.

Section 1.81 provided:

Requests for amendment of rules.—Any person may petition for amendment of any rule or regulation. Such petition shall show the desired change in the rules and regulations and set forth the reasons in support thereof.

hearing in each case upon such a request.[7] As we pointed out in our opening brief, page 23, a waiver may also be requested with respect to the Commission's multiple ownership rules. This does not mean, of course, that the mere filing of an application for a waiver (actually, none was filed here[8]) would necessarily require the holding of a hearing, for if that were the case a rule would no longer be a rule. It means only that it might be an abuse of discretion to fail to hear a request for a waiver which showed, on its face, the existence of circumstances making application of the rule inappropriate.

Another case in which the facts do not fit respondent's formulation is *Felman* v. *United States* (N.D. Ill.), March 13, 1950 (not reported), affirmed, *per curiam*, 339 U.S. 973 (see opening brief, p. 24). The Commission rules upheld by

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[7] As pointed out in our opening brief (pp. 27-28), a hearing would be afforded if there were a question of compliance with a rule. That was the purpose of the hearing ordered in *Thomas S. Lee Enterprises, Inc.*, 5 Pike & Fischer, Radio Regulation 1179 (Resp. Br. 19). The Commission there found that the applicant had induced violations of the Chain Broadcasting Regulations, and specifically refused to reconsider the policy bases of the rules, declaring that such arguments should be directed to a request to amend the rules (p. 1200). It granted a renewal of the licenses involved solely because of the severity of the penalty involved and to give the applicant an opportunity for a final chance to achieve compliance (p. 1200).

In the case of an applicant, such as respondent, who already was the sole owner of the maximum number of stations, however, there would be no factual question to resolve at an evidentiary hearing.

[8] See opening brief, p. 23.

that decision[9] prohibited any future contracts in which the assignor of a station, as part of the contract of sale, reserved the right to use future time on the station. Existing contracts, previously approved by the Commission, were permitted to continue for a period of fifteen years provided they were modified to meet certain fixed conditions. The rules thus constituted a modification of previous Commission policy in applying the general statutory standards of public interest and licensee responsibility. They cannot be characterized, as respondent has attempted to do (Br. 14), as a mere codification into rule of the necessary licensing effect of Section 301 of the Act.[10] Cf. *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244 (C.A.D.C.). And respondent's view of the rules establishing a television allocation plan assigning channels to communities throughout the United States, sustained in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C.A. D.C.), is similarly unsound. For the determination of the Commission that the general statutory

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[9] Sections 3.139, 3.241, 3.659. The rule applicable to standard broadcast (AM) stations, Section 3.139, was recently changed in number only from 3.109, the number given it in our opening brief. See 20 F.R. 9041, 9059.

[10] Nor, of course, are the Commission's lottery rules, sustained in part in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, the result of any declaration by Congress that a license may not be granted to one who broadcasts lotteries. They are the result of the Commission's policy determination that the violation of 18 U.S.C. 1304, a statute prohibiting the broadcast of lotteries by licensed stations is sufficiently serious under the statutory public interest standard to warrant rejection of an applicant otherwise fully qualified.

standard of Section 307(b) requiring a "fair, efficient, and equitable distribution of radio service" could best be achieved in the new television field through the adoption of a fixed allocation plan, and that applications inconsistent with this plan would "not be accepted for filing," Rule Section 3.607, 47 C.F.R. 3.607, was not a necessary consequence of the Act. On the contrary, in the standard broadcast (AM) field the Commission has always permitted any applicant to apply for a channel at any location.[11]

Respondent also seeks comfort from a proposed amendment to the Communications Act which was one of several proposals (none of which was adopted) designed to deal with the question of treatment of newspaper applicants for broadcasting frequencies.[12] The burden of these proposals, as the committee reports indicate, was that the Commission should not deem a newspaper applicant for a frequency *per se* disqualified. The Commission had never in fact refused to consider a newspaper applicant merely because of its news-

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[11] The reference to the "Davis Amendment," 45 Stat. 373, in respondent's brief does not help respondent's argument. For that amendment, which did represent a Congressional effort to fix by law the manner of distributing broadcast stations, was repealed in 1936, 49 Stat. 1475 (after the section was inserted in the Communications Act as 307(b), 48 Stat. 1084), for the express reason that such decision might be better left to the Commission. See H. Rep. No. 2589, 74th Cong., 2d Sess., p. 3; S. Rep. No. 1588, 74th Cong., 2d Sess., p. 2.

[12] See S. Rep. No. 741, 81st Cong., 1st Sess., on S. 1973, pp. 2-3; H. Rep. No. 1750, 82d Cong., 2d Sess., on S. 658, p. 9; H. Rep. No. 2426, 82d Cong., 2d Sess., on S. 658, p. 18.

paper interests and, as respondent points out (Br. 20-21), the proposal to which it refers was dropped in committee. It is difficult to see the relevance of this to respondent's case. The inference that Congress was concerned lest there be discrimination against newspaper applicants scarcely supports the view that Congress believes that the Commission should not have rules which limit the number of frequencies which may be awarded to any one person.

The fact is that Congress has long been mindful of the existence of multiple ownership rules [13] and has never intimated disapproval. At one point, indeed, there was a proposal to fix a statutory ceiling upon ownership of broadcasting facilities by any one person. See S. 1333, 80th Cong., 1st Sess. The Chairman of the Commission opposed this provision in the bill on the grounds that it was unwise to adopt a single standard for the various classes of broadcast service and that, in the interest of flexibility, the power to fix appropriate standards should be left with the Commission. Hearings before Subcommitte of Senate Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess., pp. 61-65. S. 1333, as subsequently reported out by the committee, omitted this provision. See S. Rep. No. 1567, 80th Cong., 2d Sess.

In summary, respondent's position creates an unnecessary conflict between the rule-making func-

[13] See Hearings before the Senate Committee on Interstate and Foreign Commerce on S. 814, 78th Cong., 1st Sess., pp. 716-717.

tion and Section 309(b). Respondent would resolve that conflict by destroying the rule-making power. We submit that the only principle to be derived from established precedents is that where the Commission has adopted a reasonable rule properly related to considerations of the public interest, the requirements of Section 309(b) are met by a hearing, where appropriate, on the question of compliance with the rule.

H. The Rules Are Reasonable

The court below did not hold that the multiple ownership rules were not reasonably related to considerations which the Commission may take into account in determining whether applications should be granted as meeting the statutory standard of the public interest.[14] In our opening brief (pp. 28-42),

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[14] The court of appeals stated (R. 51-52):

> The Commission argues that the challenged rules carry out its established policy of encouraging as many qualified persons as possible to seek broadcast licenses, as the public interest requires maximum diversification of program and service viewpoints; and that they also carry out the general policy of favoring competition which Congress wrote into the Communications Act. The multiple ownership rules are, the Commission says, "therefore a formulation of *Commission* policy in the licensing of stations, which is based in part upon enunciated Congressional policy applicable to radio broadcasting." We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule.
>
> However laudable its policies may be, we have seen that the Commission is bound by its own statute and by the requirements of due process to grant a full hearing before denying an application for an available frequency sought by a citizen for a lawful use. * * *

we nonetheless pointed out that the rules are reasonable and that they are calculated to implement policies which the Commission is authorized and, indeed, obligated to pursue.

The Commission's Report succinctly states the basic policy considerations underlying the rules:

> * * * Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. [R. 21.]

The Commission's concern, in short, was with two aspects of the basic problem of preserving a full measure of competition in the broadcasting field: competition in the economic sense, and competition in the presentation of programs and viewpoints.[15] Diversification of ownership interests is the only practicable means of safeguarding these objectives.

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[15] As early as in its Report on Chain Broadcasting (Docket No. 5060, May 1941), p. 72, in discussing the problem of National Broadcasting Company's ownership of two networks, the Commission emphasized the importance of avoiding a concentration of power in too few hands. It stated, "Our determination that it is not in the public interest for a station to enter into a regular affiliation contract with a network organization maintaining more than one network does not, however, rest merely upon competitive considerations. We are seriously concerned also with the maintenance of a free radio system from the point of view of concentration of power over licensees and their listeners." The Report also referred to the general problem of multiple ownership, although the investigation had dealt primarily with network operations. (Report on Chain Broadcasting, 1941, pp. 2, 99.)

As the Commission's Report makes amply clear, the Commission was not dealing with questions of violation of the antitrust laws. That is not its function. The Commission's obligation is to promote "the larger and more effective use of radio," *National Broadcasting, supra*, p. 216. In this effort, the Commission has drawn, and properly so, upon the competitive philosophy which underlies and informs the antitrust laws.

Respondent concedes that the Commission may consider practices falling short of illegality (Br. 23), and that it may consider diversification of program and service viewpoints (Br. 27). Despite this concession, it proceeds to urge that the rules cannot properly be related to the Commission's announced objectives because they are not based upon findings covering those matters which would have to be considered in order to find an antitrust violation. It relies (Br. 24) upon *United States* v. *Columbia Steel Co.*, 334 U.S. 495, and *Transamerica Corp.* v. *Board of Governors of Federal Reserve System*, 206 F. 2d 163 (C.A. 3).[16] But since those cases applied the standard of illegality under the antitrust laws, they have no application

[16] In the *Transamerica* case, while the court found no violation of law, it stated, "We agree that this quantitative analysis discloses a tremendous concentration of banking capital, and thereby of economic power, in the hands of the Transamerica group which may be unwise and against sound public policy. It may well be in the public interest to curb the growth of this banking colossus by appropriate legislative or administrative action. This, however, is not for us to decide." 206 F. 2d at 169.

here. As emphasized in our opening brief (pp. 34-35), the Commission has the duty to provide for the fullest use of radio in the public interest through a licensing policy reflecting the concept of competition. *National Broadcasting Co.* v. *United States, supra*; *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28 (C.A.D.C.). The significance of *National Broadcasting* and *Mansfield Journal* lies not in the particular practices involved, but in their recognition that the Act's policy in favor of competition and diversification is a touchstone of the public interest.[17]

It follows that the Commission need not, and should not, wait until the undesirable effects of undue concentration manifest themselves in extreme form. Certainly, there is nothing arbitrary in a farsighted recognition that such concentration represents a potential threat to the continued economic vigor of the "independents" and that the

[17] Respondent's suggestion that since the allocation plan permits a theoretical total of 1850 commercial television stations, and one station constitutes only .00054 of the total, the rules are therefore arbitrary (Br. 25), is plainly misleading. In the first place, the number of operating television stations is under 500. See 21st Annual Report of the Federal Communications Commission, p. 94. In the second place, respondent's stations now can render service to well over 7,000,000 persons, counting only those persons within the standard metropolitan areas of the cities in which it has stations. (1950 Census.) Miami, the city for which respondent had its application dismissed by the Commission, has a population within its metropolitan area of 495,000 persons. Plainly, an additional station there would represent an increase in competitive strength and ability to reach large segments of the public which can hardly be characterized as the infinitesimal change respondent attempts to make it appear.

very existence of larger multiple holdings would entail a diminution in program diversification.[18]

Respondent argues (Br. 27-28) that the rules are not reasonably related to the object of diversification of program and service viewpoints because they take into account the applicant's ownership of stations in areas other than those which would be served by a grant of his pending application.[19]

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[18] The Commission's prophylactic approach to the problem of multiple ownership may be compared to that adopted by Congress in Section 8 of the Clayton Act, 38 Stat. 733, as amended, 15 U.S.C. 19. This section prohibits any one person from being a director of two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, if such corporations are competitors and the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws. In a suit arising under Section 8, where it was argued that no specific evil had resulted from the dual directorship involved, the District Court for the Southern District of New York emphasized the preventive nature of the legislation in stating: "* * * what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative." *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 616.

[19] Respondent also claims that the rules would necessarily exclude a qualified applicant in an area not served by any existing facility, even where there was no other qualified applicant. It makes no claim, however, that this situation has ever arisen. Respondent's own application for Channel 10 in Miami, Florida, which was dismissed by the Commission because respondent already owned five television stations, was not the only application for the channel. See *Storer Broadcasting Co.*, 9 Pike & Fischer, Radio Regulation 1363. And the two additional UHF television stations acquired by respondent under the amended rule were both acquisitions by purchase of stations already authorized. In any event, if the situation posited by respondent should arise, the Commission, of course, could grant a waiver.

Adequate diversification cannot be judged, however, in terms of a purely local outlook.[20] There is a physical limit to the number of radio channels available for distribution in the United States. The entire field of broadcasting is thus necessarily confined to a limited number of licensees. In the nature of things, those granted licenses have very considerable power to decide what will and what will not be heard by the public. It is not enough to ask whether there is some diversity in the viewpoints expressed over the air in individual localities. An affirmative answer to this question would not detract from the conclusion that to grant to one person control, in many communities, of a scarce and very important outlet of expression would have pervasive effects. See opening brief, pp. 31-32.

Respondent also suggests that the multiple ownership rules have stunted the growth of FM and television broadcasting (Br. 35). This is an unfounded assertion which respondent makes no real attempt to support. It is unaccompanied by the citation of even a single instance in which a multiple owner sought to acquire a license in a city where there were no other qualified applicants and was prevented from doing so by the rules. When the Commission amended the television multiple ownership rule in 1954, to permit the acquisition of two additional UHF (ultra high frequency) television

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[20] The Commission has never limited its consideration to other stations licensed to the applicant in the same city or contiguous areas. See, *e.g.*, *Aladdin Radio and Television, Inc.*, 9 Pike & Fischer, Radio Regulation 1.

stations (19 F.R. 6099), it did so because there were special problems facing UHF stations (*e.g.*, the scarcity of television receivers capable of receiving UHF transmissions and the less efficient propagation of UHF signals) which tended to discourage entry into that field.[21] But recognition of these difficulties demonstrates only that the rules are sufficiently flexible to permit change in appropriate circumstances. It provides no support for the contention that multiple ownership rules fail to serve the public interest.

III. The Commission Complied with the Administrative Procedure Act

Respondent's final point is devoted to the contention that the Commission's Report, promulgating the rules, does not meet the requirements of the Administrative Procedure Act.[22] Respondent appears to recognize, at the outset, that Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), which requires the agency to "incorporate in any rules adopted a concise general statement of their basis and purpose," is the controlling provision here (Br. 32). But it promptly ignores this and proceeds to cite cases involving agency deci-

[21] For a discussion of the problems facing UHF stations, see "Television Network Regulation And The UHF Problem," a memorandum prepared for the Senate Committee on Interstate and Foreign Commerce by Harry M. Plotkin, special counsel, 84th Cong., 1st Sess., pp. 1-6. The comments on multiple ownership of stations (pp. 39-40) are of particular interest.

[22] The Petition for Review filed below contained no such allegation of error (R. 36-37).

argument proves too much, for it is one which might be advanced against almost any type of rule. The Commission's judgment here was that preservation of full opportunity for competition and for the presentation of diverse viewpoints is, *in and of itself*, of sufficiently great public importance to warrant the prevention of inordinately large holdings of broadcasting channels, even assuming that a multiple owner who seeks to exceed the established maxima is well qualified, in every other respect, to serve the public.[28] The Commission's experience and the record of the industry furnish a convincing basis for the agency's conclusion that there are enough different persons in the United States capable and desirous of serving the needs of the public so that extremes of multiple ownership may be avoided without adversely affecting the public interest in securing qualified licensees. There is nothing, we submit, to suggest the contrary.

Should future experience or changed conditions demonstrate the propriety of modifications in the rules, the Commission, of course, is em-

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Act calls 'the public interest, convenience, or necessity,' " and that the Commission has no power to decide "*in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations" (R. 50).

[28] A single important factor may similarly warrant a denial in an adjudicatory proceeding, though the applicant is well qualified in all other respects. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223.

powered to make them; it did so during the pendency of these proceedings in authorizing a maximum of seven TV stations, provided that two of them are in the UHF part of the radio spectrum (note 6, p. 8, *supra*). And if exceptional circumstances suggest, in a particular case, that a waiver or exception is appropriate, the Commission has power to grant it.[29]

If, as we have urged, the Commission may impose *some* limitation on multiple ownership of broadcasting stations, it seems plain that the selection of a particular ceiling is a matter for the Commission's informed and expert judgment. Certainly, "where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific existence" is no less applicable to an administrative rule than to a statute. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 186. Respondent's burden in challenging the rule is to show that "the Commission had no reasonable ground for the exercise of [its] judgment." *American Trucking Assns.* v. *United States,* 344 U. S. 298, 314.

This burden cannot be sustained. The Commission's report shows that the particular

[29] As noted above (pp. 23–24), respondent here can raise no issue as to whether it should have been accorded exceptional treatment. It did not seek a waiver and it has failed to appeal the Commission's action in dismissing its application. Its challenge is directed simply and solely to the rule-making power.

numerical limitations selected were preeminently reasonable and far from stringent or arbitrary. The limitation of five TV stations was the same as the rules had previously contained. The Commission concluded that this limitation should be retained because it found, "based on extensive experience with the problems of multiple ownership," that the limitation had "proven practicable and desirable" (R. 25). The number of FM broadcasting stations was fixed at seven (one more than the notice of proposed rule-making had provided), so that the limitation would be the same for AM and FM stations (R. 26). The limitation on AM stations, which was the only new substantive provision in the rules, was fixed at seven, although the Commission noted that a greater number of stations can be accommodated in the FM band and that a more stringent limitation on AM might have been justified. It decided, however, to permit seven AM stations "in order that present holdings of such stations be not unduly disrupted" (*ibid.*). The Commission also noted that limiting AM holdings to seven was consistent with the historical development of AM broadcasting, a field in which "only a very few parties" had any interests in more than seven stations (*ibid.*). The Commission cannot be said to have been unreasonable in concluding that someone who owns a total of nineteen broadcasting stations should not be permitted to increase his power in the field any further.[30] We

stress again that this "essentially empiric" judgment was of the kind entrusted by Congress to the "permanent expert body" charged "with the duty of being responsive to the dynamic character of [broadcasting] problems." *Board of Trade* v. *United States*, 314 U. S. 534, 546.

The Commission rejected, after careful consideration, alternative proposals which would have given weight, for purposes of fixing the maxima, to such factors as class and size of stations, geographical location and population served. It did so because it concluded, "as a result of study of the present holdings of multiple owners," that the inclusion of these factors would result in a rule which would be "either unsatisfactory or unworkable" (R. 22–23). Such a rule, it was

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[30] The rules provide that, in computing the number of stations in which a person has an interest, holdings of less than 1% of the stock of corporations with more than 50 stockholders may be disregarded (R. 28). Although Storer attacked this provision in the court of appeals as unreasonable (R. 37, 47), it does not affect Storer, since the latter's radio and television holdings are all 100% interests (see p. 8, *supra*). Storer, therefore, has no standing to challenge this provision. *Heald* v. *District of Columbia*, 259 U. S. 114; *Queensboro Farm Products* v. *Wickard*, 137 F. 2d 969, 977 (C. A. 2).

In any event, we submit that the provision is not unreasonable. It does not, as Storer stated below (R. 37), treat the ownership of 1% of the stock of a station "as equivalent to ownership, operation or control" thereof. The multiple ownership rules are not framed in terms of "control" of a station but in terms of having an interest therein. The 1% provision merely recognizes that certain interests may properly be treated as *de minimis*.

found, would necessitate either substantial divestment of present holdings by existing licensees or an extreme upward revision of the total number of stations to be permitted.[31] The course chosen by the Commission avoids dislocation of the industry and continues in effect (with some changes) a set of governing criteria which reasonably secures the vital public interest in competition and diversification.

The multiple ownership rules do not take anything away from Storer. They do not require it to make changes in its business practices.[32] They *do* interpose a bar to its acquisition of additional stations, since it already has the maximum number in all categories. But the acquisition of such stations through Government grant is a privilege, not a right, and the Government may properly limit the number of channels granted to a single person so as to promote the "larger and more effective use of radio." The limitations here imposed are plainly appropriate to that end.

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[31] If, for example, one person were already the licensee of five stations in a single area, a limitation, expressed in terms of no-more-than-"X"-per-area would compel divestiture unless "X" were fixed at five or higher. But allowing a licensee five-per-area would permit inordinately large aggregations on a nationwide scale.

[32] Compare the extensive changes in methods of doing business required by the Chain Broadcasting Regulations and by the Interstate Commerce Commission's leasing rules upheld in *American Trucking Assns.* v. *United States*, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed, and the Commission's order amending the multiple ownership rules should be affirmed.

Respectfully submitted.

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